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October 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: June 9, 2005
Case Number: TSO-0251

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should be restored.

I. Applicable Regulations

The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if the must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance). Thus, the standard for eligibility for a clearance differs from the standard applicable to criminal proceedings in which the prosecutor has the burden of proof.

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). Again, the burden is on the individual to present testimony or evidence to

demonstrate that he is eligible for access authorization, i.e., that access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

II. Background

The Individual has worked at a DOE facility for over twenty years. In 1984, she completed a security questionnaire, which asked if she had ever been "a user" of illegal drugs. DOE Ex. 8 (Question 11a). The Individual answered "no." In 1985, she was granted a clearance.

In February 2003, the Individual completed a security questionnaire, which asked whether (i) the Individual had used illegal drugs in the past seven years, and (ii) whether the Individual had used illegal drugs while holding a clearance. DOE Ex. 5 (Questions 25b, 25c). The Individual answered "yes" to both questions, stating she had used marijuana one time in 1999.

In December 2004, a DOE personnel security specialist interviewed the Individual. DOE Ex. 11. During the interview (the PSI), the Individual confirmed that she smoked part of a marijuana cigarette in 1999. The Individual also reported using marijuana once in 1979, cocaine once in 1982, and marijuana about four times in 1984 or 1985.

In May 2005, the DOE notified the Individual that the reported drug use constituted derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8(k) and (l) (Criteria K and L). Notification Letter, May 13, 2005. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. See Individual's Letter, May 31, 2005. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

The Individual did not dispute that the information she reported gave rise to a security concern. Rather, the Individual maintained that (i) her 1999 marijuana use was an isolated incident and (ii) she did not report her prior drug use on the 1984 questionnaire because she misinterpreted the question.

III. The Evidence

A. Documentary Evidence

The documentary evidence includes several performance appraisals and awards received by the Individual, a letter from the personnel security division leader, a laboratory report from a screening of a sample of the Individual's hair, and two letters: one from a friend of the Individual and another from the Individual's professional coach.

The performance appraisals and awards all indicate that the Individual is more than a competent employee. The documents show that the Individual regularly meets or exceeds expectations and is a valued member of her team.

The letter from the personnel security division leader confirms that the Individual had no record of security infractions. The laboratory report was negative for illegal substances.

The letters from the Individual's friend and professional coach both state that the Individual is reliable, honest, and trustworthy. The friend wrote that she was not aware of the Individual using any illegal substances. The friend wrote that it was not part of the Individual's lifestyle or practice. The professional coach wrote that the Individual expressed to her that she deeply regretted the actions at issue here.

B. The Hearing Testimony

The DOE counsel did not present any witnesses at the hearing. The Individual testified and presented 11 witnesses. They were: the Individual's two neighbors, two co-workers, the Individual's supervisor, a business associate, and five friends.

1. The Individual

The Individual testified about her 1999 marijuana use. Transcript (hereinafter "Tr.") at 145-147. The Individual testified that she smoked a "small portion" of a marijuana cigarette while alone in her home. Tr. at 147, 149. The Individual stated that she very much regretted the marijuana use. Tr. at 145. She stated that she does not associate with drug users and has never had drug paraphernalia in her home. Tr. at 147. When asked whether she had any desire to smoke marijuana in the future, the Individual responded, "I won't repeat that mistake, no." Tr. at 148. The Individual stated that when she disclosed her marijuana use, she was aware of the likelihood of negative consequences. Tr. at 150. She also stated that she never sought out drugs and had no desire to do so in the future. Tr. at 169, 170.

The Individual also testified about her completion of the 1984 security questionnaire. The questionnaire asked, "Are you now or have you ever been a user of any narcotic?" Tr. at 152. She stated, "The question looked to me as though they were - they were looking for people who had habits or addictions of drugs." Tr. at 152. The Individual stated that if the question had asked whether she had ever used an illegal substance, rather than asking if she had been a user of such substances, she would have answered in the affirmative. Tr. at 165.

2. The Individual's Neighbors

Both of the Individual's neighbors stated that they had never seen the Individual under the influence of drugs or alcohol. Tr. at 19, 29. One of the neighbors described the Individual as "really friendly, outgoing, very knowledgeable." Tr. at 18. He stated that he trusted the Individual. Tr. at 25. The neighbor testified that the Individual had the keys to his home and would look after it when he and his wife were away. Id. The other neighbor described the Individual as "very talented and honest," "very smart," and "reliable." Tr. at 29. When asked if she believed the Individual was honest, the neighbor responded, "a hundred percent." Tr. at 29. Both neighbors stated they were surprised to learn that the Individual had smoked marijuana. Tr. at 23, 33.

3. Friend No. 1

Friend No. 1, a psychologist, testified that she met the Individual when the Individual attended workshops the friend was running. Tr. at 39. The friend stated that the Individual had a health-related business, and the psychologist often referred patients to the Individual. Tr. at 40. The friend described the Individual as "truthful," "forthright," "conscientious," and "fair." Tr. at 41. The friend testified that the Individual often discussed how much she enjoyed her job. Tr. at 46. She also stated: [The Individual]'s a dependable person. If she's going to be late, she calls and shows up and does her part of the process. . . . That has been my experience with her. She's easy to travel with, flexible, you know, being willing to compromise about things when they don't go right." Tr. at 48-49. The friend testified that she had never seen the Individual under the influence of drugs or alcohol and did not have a reason to question the Individual's sobriety. Tr. at 43. She also stated that the Individual was an honest person and she was not surprised that the Individual admitted her marijuana use to the DOE. Tr. at 47-48. The friend also stated that "I do think that she's quite remorseful . . . and understands the severity of it, is willing to admit it was a big mistake and that it had serious consequences for her." Tr. at 51.

4. Friend No. 2

Friend No. 2, also a former co-worker, testified that she met the Individual about eighteen years ago. Tr. at 71. She stated that she and the Individual enjoyed many activities together such as skiing, traveling, dinners, and other social gatherings. Tr. at 71-72. The friend stated that she believed the Individual was honest because "I've never had an incident in all the years where she was dishonest with me about anything. She seemed to be a true friend and is there when you need her, and I've never had any incident or concern about her not being honest with me about something." Tr. at 72. She stated that she never suspected the Individual was under the influence of drugs. Tr. at 73. The friend indicated that she was surprised that

the Individual used marijuana, but was not surprised to learn that the Individual disclosed the use because "she's honest." Tr. at 75-76.

5. Friend No. 3

Friend No. 3 testified that she has known the Individual for about fifteen years. Tr. at 81. The friend stated that she and the Individual engaged in several activities together such as travel, prayer groups, and conferences. Tr. at 81. She stated that the Individual subleased office space from her. Tr. at 82. The friend testified that the Individual was a good lessee because "she paid her bills on time, has got her own clients, and supported the other people that were subleasing, because we were all independent." Tr. at 82. When asked her opinion on the Individual's honesty, the friend responded, "I would trust her with my life. Very definitely. I find her to be very honest." Tr. at 83. Regarding the Individual's reliability and trustworthiness, the friend stated, "I found her to be impeccable. She's on time. Anytime we do anything, if she's not going to be able to be present, she lets me or the other people involved know. She always takes her fair share of any financial responsibility." Tr. at 83. The friend stated that she never suspected the Individual of using drugs. Tr. at 83.

6. Friend No. 4

Friend No. 4 testified that she met the Individual about five years ago. Tr. at 90. She stated that she and the Individual traveled together and that she knew her very well. Tr. at 90. The friend testified that the Individual was a "wonderful person," "extremely honest," and reliable and trustworthy. Tr. at 90-91. She stated, "I think she's a really good person. I would have absolutely no problem putting her in charge of my business or putting her on my bank account. . . . Everything [the Individual] has ever said to me that she's going to do, she's done, which makes her reliable to me. I think anyone who has her working for them would be extremely lucky." Tr. at 91. The friend testified that she never suspected the Individual was under the influence of drugs and had never seen her in possession of any drug paraphernalia. Tr. at 92.

7. Friend No. 5.

Friend No. 5 stated that she met the Individual about eleven years ago. Tr. at 97. When asked her opinion of the Individual, the friend stated, "I think [the Individual] is a very warm - I see her as a bubbly personality. I love to be around her. I think she's very responsible, very reliable." Tr. at 98. The friend stated that she asked the Individual to join her holistic health center as an independent contractor because "I wanted people with her qualities and her integrity to be representing our center with the services that she provided. . . . [S]he represented a very nurturing quality to the clients that came into our center. I knew she was reliable, and she was when she came on board. She was always there on time. She was

there when she was scheduled to be there." Tr. at 98-99. The friend stated that she believed the Individual to be "very honest." Tr. at 99. She also stated that the Individual was "very reliable. She always showed up when she was scheduled." Tr. at 100. The friend stated that she was surprised to learn that the Individual had used marijuana because it was inconsistent with what she knew about the Individual. Tr. at 103. She was not surprised that the Individual disclosed the marijuana use "because she's a very honest individual, in my experience." Tr. at 102-103.

8. Individual's Professional Coach

The coach testified that she had been working with the Individual for about three and one-half years. Tr. at 117. She testified that she believed the Individual to be "completely honest and truthful." Tr. at 118. The coach testified that the Individual was entrusted with her parents' and aunt's finances and affairs and always tried to ensure her actions were appropriate and proper. Tr. at 119-120. Regarding her opinion of the Individual's trustworthiness and reliability, the coach stated, "She keeps all her commitments with me. If she can't keep a commitment, I know about it right away. . . . [I]f disagreements or issues come up between her and other people, she always wants to make sure that she gives everyone a fair shake and that she takes responsibility for whatever may be her actions." Tr. at 120. The coach testified that the Individual is honest about her mistakes. Tr. at 121. As an example, the coach discussed a situation where the Individual informed her of an issue that had arisen at work where the Individual should have spoken up and did not do so. The coach stated that the Individual discussed the problem with her and asked for suggestions on correcting the problem. Tr. at 122. The coach also stated that the Individual was "highly disciplined" because, for example, she was able to "save her money over so many years and be able to purchase real estate investments so that she could be financially secure." Tr. at 123. The coach also stated that the Individual was ethical in her dealings with her renters. Tr. at 124. The coach testified that the Individual never talked about using drugs or wanting to use drugs. Tr. at 128-129. She stated that drug use would be inconsistent with the Individual's lifestyle. Tr. at 129. She also stated that she was not surprised that the Individual disclosed her 1999 marijuana use to the DOE because "[the Individual] is very comfortable with the truth and she's very uncomfortable with things that aren't true. She's very uncomfortable dealing with people that are not forthright, because she is such a forthright person." Tr. at 125.

9. Co-worker No. 1

Co-worker No. 1 testified that he had worked with the Individual for approximately ten years. Tr. at 55. He stated that the Individual was a hard worker and "she was a part of the reason - a good part - that we all came in eager to work. We enjoyed working together. We were all there on time every day, worked a good day." Tr. at 56. He

stated that he believed the Individual was reliable and trustworthy. Tr. at 56. For example, he stated that he and the Individual had keys to each other's homes. Tr. at 56. When asked how well he knew the Individual outside of work, the co-worker stated, "We've gone camping several times. We've gone to - you know, we go to dinner, we go to events, after-dinner conversations at her place or my place, things like that. Lunches quite often." Tr. at 57. The co-worker stated that the Individual was a relatively quiet person who led a quiet lifestyle. Tr. at 61. He also stated that he never suspected that the Individual was under the influence of alcohol or drugs. Tr. at 58.

10. Co-worker No. 2

Co-worker No. 2 stated that she and the Individual shared an office for more than a year. Tr. at 106-107. She described the Individual as "a great employee" because "she's very conscientious. She's a good, hard worker. She's always working for her experiment or project that she's working on for its best interests and that included working as a team. You know, she would work together with others in a way that it was for the good of the project." Tr. at 107. The co-worker also described the Individual as "very reliable" and "very trustworthy." Tr. at 107-108. She stated that she could not think of an instance where the Individual was not candid with her. Tr. at 112. The co-worker stated that she never believed the Individual to be under the influence of drugs. Tr. at 109. She also stated that she was not surprised that the Individual disclosed her marijuana use because "[the Individual] is very honest. She always wants things to be out on the table." Tr. at 110.

11. Individual's Supervisor

The Individual's supervisor stated that he had known the Individual for three years. Tr. at 131. He described the Individual as "an extremely good worker in all facets, dependable, reliable, and is very good." *Id.* The supervisor also stated that the Individual was "someone you can count on." Tr. at 132. Regarding his opinion of the Individual's honesty, the supervisor stated, "there has never been an instance when I've ever felt like I had to distrust anything she said" and "I trust her implicitly." Tr. at 133, 138. The supervisor stated that he never had any reason to question the Individual's sobriety or suspect she used drugs. Tr. at 139. The supervisor stated that the Individual was a valuable asset to his work and to the facility. Tr. at 140.

IV. Analysis

The existence of a security concern here is undisputed. The Individual disclosed (i) a one-time use of marijuana in 1999 while holding a clearance, and (ii) earlier instances of illegal drug use that were not reported on her 1984 security questionnaire. The information disclosed raises security concerns under Criteria K and L.

Based on the testimony and evidence, I am convinced that the Individual's illegal drug use is in the past. The Individual testified to that effect and brought forward an array of witnesses to corroborate that drug use is not part of her life. The witnesses know the Individual well, and I believe that they testified honestly and candidly. From the testimony, I understand that the Individual spends much of her non-working hours with friends engaging in activities such as attending conferences, lectures, and extensive travel. Each of the witnesses expressed surprise about the 1999 incident and believed that the Individual did not use illegal drugs. The Individual submitted the results of a laboratory screening that showed no illegal drug use. Finally, there is no allegation or suggestion of any predisposition to substance abuse or dependency that might raise a concern about the possibility of illegal drug use in the future. Accordingly, I have concluded that the Individual has resolved the Criterion K concern.

I now turn to the Criterion L concern regarding whether the Individual is honest, reliable, and trustworthy. It is difficult for an individual to resolve a security concern that arises from use of an illegal substance while holding a clearance. DOE's zero tolerance policy for drug use is well-known. Individuals seeking to resolve the concern must establish that, despite this breach of trust, DOE can trust them in the future. See e.g., *Personnel Security Hearing*, VSO-0430, 28 DOE ¶ 82,503 (2001); *Personnel Security Hearing*, VSO-0394, 28 DOE ¶ 82,781 (2001); *Personnel Security Hearing*, VSO-0307, 27 DOE ¶ 82,837 (2000); *Personnel Security Hearing*, VSO-0136, 26 DOE ¶ 82,778 (1997). Similarly, it is difficult for an individual to resolve the security concern arising from an incorrect answer on a security questionnaire. Again, the individual must establish that the DOE can trust him or her in the future. See, e.g., *Personnel Security Hearing*, TS0-0173, 29 DOE ¶ 82,833 (2005).

In this case, the Individual has resolved the Criterion L concern. In making this determination, I have considered the following factors. The Individual herself disclosed the information giving rise to the security concern. The 1999 one-time marijuana use was not associated with any risk of breach of security: the Individual was alone in her home. The Individual testified that she greatly regretted the use, and witnesses corroborated that testimony. As for the accuracy of the 1984 security questionnaire, I believe that the Individual had no intent to deceive. She testified that she did not believe that she had been a "user" of illegal drugs and therefore did not list the prior incidents of drug use. I believe that her testimony was sincere, and it is consistent with the fact that, when asked if she ever "used" illegal drugs, she answered "yes." DOE Ex. 5 (Questions 24b and 24c); Ex. 11 (PSI at 7-8). Her testimony is also supported by the credible and candid testimony of a variety of witnesses to the effect that the Individual is honest, reliable, and trustworthy.

In sum, the testimony at the hearing and the documents presented convince me that the Individual has resolved the Criteria K and L

concerns raised by the derogatory information cited in the Notification Letter.

V. Conclusion

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual's eligibility for a security clearance. I also find sufficient evidence in the record to fully resolve that doubt. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual's access authorization should be restored.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: October 26, 2005